

Memorandum

To: Chairman and Commissioners

Date: April 20, 2000

From: Robert I. Remen

File No: C 2.1
BOOK ITEM 4.12
INFORMATION

Ref: CALTRANS' EXPOSURE FOR PAYING LEGAL COSTS IN LAWSUITS

At the March Commission meeting, Commissioner Wolf presented a proposal to sponsor legislation authorizing Caltrans to recover its legal costs for lawsuits in which the State prevails.

Commissioner Hallisey asked staff to clarify the existing statutory provisions, if any, allowing Caltrans to recover legal costs for tort cases in which the State prevails.

The Caltrans response to this inquiry is attached. It is clear from this response that a policy to recover legal costs for all, or some categories, of the lawsuits in which the State prevails would require legislation.

Memorandum

To: CHARLES OLDHAM
Deputy Director for Policy and Legislation
California Transportation Commission

Date: April 24, 2000

File:

From: DEPARTMENT OF TRANSPORTATION
LEGAL
Mail Station 57

Subject: Summary of the Availability of Sanctions for Frivolous Lawsuits

You have asked for a summary of the law regarding the right, if any, of a State agency to pursue attorneys' fees or other sanctions when it consistently prevails in lawsuits brought by the same parties on the same project or issue solely for the purpose of unwarranted obstruction or delay.

Please be advised that, while there is no remedy for such suits specifically, governmental agencies so exposed have available as a remedy the same remedies as are available to litigants so situated generally. As for the plaintiff/petitioner represented by counsel, agency's attorney may move for a variety of sanctions, including attorneys' fees. As to parties acting on their own, the court may be petitioned to require the posting of a bond to cover costs.


When the plaintiff/petitioner of a frivolous suit is represented by an attorney, the trial court is empowered by Code of Civil Procedure 128.5 to impose on the attorney reasonable expenses, including the attorneys' fees of the governmental agency, incurred by it as a result of the bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. This authority extends to arbitration proceedings. The actions and tactics involved include the making or opposing of motions, and the filing of a complaint or cross-complaints, provided it is followed by service on the opposing party. Frivolous is defined as totally and completely without merit or solely for the purpose of harassing the opposing party. While the motion for such sanctions is normally made by the injured party's attorney, the trial court may grant sanctions on its own motion. Although the court is authorized to impose punitive damages as well, this authority are narrowly limited only to certain cases that result from prior felonies.

As for a person bringing frivolous actions on his own behalf, under Code of Civil Procedure section 391.1, the court is authorized to impose on him at any time prior to judgment a requirement that he post a bond for the likely costs of suit, should he not prevail. The court may do so only when shown that 1) the plaintiff is a vexatious litigant, and 2) there is not a reasonable probability that he will prevail against the moving defendant. A vexatious litigant is defined as one who, in the immediately

preceding seven-year period, has commenced, prosecuted or maintained, on his own, at least five suits that have either been finally determined adversely to him or that he has unjustifiably permitted to remain pending for at least two years without bringing it to trial, or who after the litigation has been finally determined against him, repeatedly attempts to retry either the validity of the determination against the same defendant or the same cause of action. (Code Civ. Proc. § 391.)

The lack of merit to a case is not in and of itself sufficient to permit sanctions. The trial court is instead authorized to do so only if the moving party shows that the opposing party's action or tactic was totally and completely without merit, measured by the objective "reasonable attorney" standard, or motivated solely by an intention to harass or cause unnecessary delay, measured by a subjective standard. Nor is the fact that an action is arguably meritorious conclusive proof that it was not brought solely for harassment or delay.

The opportunity for this sanction has been raised at least twice in environmental cases, generally, but never in a CEQA case. In *Finnie v. Town of Tiburon*, the petitioner attempted to stop a vote of the electorate on a new land use plan by asserting the city council members to have used improper tactics of persuasion and that if the measure passed it would have to be set aside for bribery and coercion. On receiving no evidence to support these allegations, the court awarded \$2,500 in sanctions. In *Albion River Watershed Protection Assn. v. Department of Forestry & Fire Protection* 20 Cal.App. 4th 34, 24 Cal.Rptr.2d 341 (1993), the State was awarded sanctions for the plaintiff unincorporated association's failure to use an attorney and for its delay in serving the complaint. However, since the first reason was the result of a then newly issued case, the matter was remanded for the trial court to determine whether the sanction should apply solely for the delay. In the case of *Summers v. City of Cathedral City*, 225 Cal.App. 3d 1047, 275 Cal.Rptr 594 (1990), the appellate court ruled that neither the element of frivolousness nor of bad faith was enough, alone, to warrant sanctions; both had to be proved.


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